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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTOINE FULBRIGHT,

Defendant and Appellant.

C083433

(Super. Ct. No. 15F05769)

A jury found defendant Antoine Fulbright guilty of burglary and he admitted multiple prior convictions. He contends the sentence enhancements imposed for two of the prior prison terms must be stricken, as the felony convictions on which they were

based have been redesignated as misdemeanors. Defendant also contends the abstract of judgment must be corrected to accurately reflect the judgment imposed. In supplemental briefing, defendant contends in light of the recent passage of Senate Bill No. 620 (SB 620), this matter must be remanded to permit the trial court to consider whether it should exercise its newly-granted discretion to strike or dismiss the prior serious felony conviction enhancement imposed under Penal Code section 667, subdivision (a).¹ The People properly concede each of these points. We remand the matter to the trial court for the limited purpose of allowing the trial court to exercise its sentencing discretion under sections 1385 and 667, subdivision (a) to strike or dismiss the prior serious felony conviction, direct the trial court to strike the sentence enhancements imposed for the two prior prison terms for which the convictions were redesignated as misdemeanors, and ensure the abstract correctly reflects the judgment as modified.

FACTS AND PROCEEDINGS

We dispense with a recitation of the facts underlying defendant's conviction, as they are unnecessary to resolve this appeal.

Defendant was convicted of possession of a controlled substance (Health & Saf. Code, § 11350) in 2007 and again in 2009 in case Nos. 07F04891 and 09F07613, respectively.² Following the enactment of the Safe Neighborhoods and Schools Act (Proposition 47), defendant petitioned the court to have these convictions redesignated as misdemeanors. The court granted both requests on December 8, 2015.

¹ Undesignated statutory references are to the Penal Code.

² The People filed a motion requesting that we take judicial notice of the December 8, 2015, orders of redesignation of sentence issued in case Nos. 07F04891 and 09F07613. Defendant did not oppose the request. We deferred ruling on the request for judicial notice and now grant it. (Evid. Code, § 452; Cal. Rules of Court, rule 8.252(a)(2).)

In September 2016, a jury convicted defendant of burglary in the instant case. (§ 459.) Defendant also admitted he had two prior strike convictions and had served three prior prison terms. (§§ 667, subds. (a), (b)-(i), 1170.12, 667.5, subd. (b).) Two of those prior prison terms, as alleged in counts 6 and 7, were for case Nos. 07F04891 and 09F07613, respectively. The trial court sentenced defendant to the upper term of six years, doubled pursuant to the three strikes law, plus five years for each of the two prior serious felony convictions, and one year each for the three prior prison term allegations, for an aggregate term of 25 years in state prison.

DISCUSSION

I

Misdemeanor Convictions

Defendant contends that because the felony convictions underlying two of his prior prison terms were redesignated as misdemeanors under Proposition 47 he should not have been subject to enhanced punishment for those prior prison terms. Defendant relies on this court's decision in *People v. Kindall* (2016) 6 Cal.App.5th 1199 (*Kindall*), to support his argument.

After briefing in this matter concluded, the California Supreme Court decided *People v. Buycks* (2018) 5 Cal.5th 857 holding in part that “. . . as to nonfinal judgments containing a section 667.5, subdivision (b) one-year enhancement, we conclude that Proposition 47 and the *Estrada* rule [*In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*)] authorize striking that enhancement if the underlying felony conviction attached to the enhancement has been reduced to a misdemeanor under the measure.” (*Id.* at p. 888.)

Here, defendant's two prior drug possession convictions were reduced to misdemeanors prior to the adjudication of the prior prison term allegations. “Once the felony priors at issue here were reduced to misdemeanors, they had ceased to exist as felonies for all purposes moving forward. Thus, . . . after the felonies' reduction, the

People had to prove under *Tenner* [*People v. Tenner* (1993) 6 Cal.4th 559] that defendant was previously convicted of those felonies. But the now-reduced convictions at issue had ceased to exist as felonies; in their place were previous misdemeanor convictions, for all purposes. These purposes include the adjudication of charged enhancements.” (*Kindall, supra*, 6 Cal.App.5th at p. 1205, italics omitted.)

Accordingly, we direct the trial court to strike the two prior prison term enhancements erroneously imposed.

II

Senate Bill No. 1393

Defendant argues in his supplemental brief that the passage of Senate Bill No. 1393 (SB 1393) requires remand so that the trial court may exercise its newfound discretion regarding the imposition of sentence for the prior serious felony conviction enhancements (§ 667, subd. (a)), which was previously mandatory. The People concur that remand is necessary “for the limited purpose of giving the trial court the opportunity to consider striking the prior serious felony enhancements pursuant to [] section 667, subdivision (a), after” SB 1393 takes effect on January 1, 2019. We accept this concession and find SB 1393 retroactive as explained in *People v. Garcia* (2018) 28 Cal.App.5th 961.

“On September 30, 2018, the Governor signed Senate Bill 1393 which, effective January 1, 2019, amends sections 667(a) and 1385(b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.)” (*Garcia, supra*, 28 Cal.App.5th at p. 971.)

Under *Estrada, supra*, 63 Cal.2d 740, “[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute’s operative date.” (*People v.*

Brown (2012) 54 Cal.4th 314, 323, fn. omitted.) Nothing in SB 1393 suggests any legislative intent that the amendments apply prospectively only, “it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill 1393 becomes effective on January 1, 2019.” (*Garcia, supra*, 28 Cal.App.5th at p. 973.) Defendant’s case will not be final on January 1, 2019. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306.)

“ ‘Defendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.’ [Citation.] In such circumstances, [our Supreme Court has] held that the appropriate remedy is to remand for resentencing unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’ [Citations.]” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) The record before us does not clearly indicate that the trial court would have declined to strike one or more of defendant’s prior serious felony convictions for sentencing purposes if it had the discretion to do so. Accordingly, we agree with the parties that remand is appropriate in this case to allow the trial court to exercise its discretion as to whether to strike one or more of his prior serious felony convictions for sentencing purposes.

III

The Abstract of Judgment

Defendant also argues the abstract of judgment should be corrected to reflect the oral pronouncement of judgment as to the court operations fee (§ 1465.8) and the court

facilities fee (Gov. Code, § 70373). The People properly concede on this point, as well. We agree with the parties.

At sentencing, the trial court imposed a “security fee and facility fee That’s \$40 and \$30 respectively.” The abstract of judgment, however, reflects imposition of an \$80 court operations fee and a \$60 court facilities fee.

“Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls.” (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385; accord, *People v. Mesa* (1975) 14 Cal.3d 466, 471.) If the clerk includes fines in the court’s minutes or the abstract of judgment that were not part of the oral pronouncement of sentence, those fines must be stricken from the minutes and the abstract of judgment. (*Zackery*, at pp. 387-389.) Here, the oral pronouncement of a \$40 operations fee and a \$30 facilities fee controls over the inconsistent and incorrect sentence set forth in the abstract of judgment. Accordingly, we order correction of the abstract of judgment so that it is consistent with the trial court’s oral pronouncement. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded to the trial court with directions to strike the sentence enhancements imposed for the two prior prison terms for which the convictions were redesignated as misdemeanors as charged in counts 6 and 7, resentence defendant after January 1, 2019, pursuant to sections 667(a) and 1385(b), as amended by SB 1393 effective January 1, 2019, and ensure the abstract of judgment is corrected to reflect the imposition of sentence, including the imposition of a \$40 operations fee under section 1465.8 and a \$30 facilities fee under Government Code section 70373. The trial court is directed to prepare an amended and corrected abstract of

judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

HULL, J.

We concur:

RAYE, P. J.

MAURO, J.